

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF TEXAS
3 MIDLAND-ODESSA DIVISION

4 UNITED STATES OF AMERICA) MO-09-CR-238
5 VS.) Suppression Hearing
6 JOHN CHRISTOPHER BRUNSON) January 14, 2010
7

8 BEFORE THE HONORABLE ROBERT JUNELL
9 UNITED STATES DISTRICT JUDGE
10 In Midland, Texas

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1 (January 14, 2010)

2 (Defendant present)

3 THE COURT: Clerk, call the case, please.

4 THE CLERK: The Court calls MO-09-CR-238, the United
5 States of America versus John Christopher Brunson.

6 MS. FLECK: Kerry Fleck on behalf of the Government.

7 MR. CASTILLO: Damián Castillo on behalf of the
8 Defendant. We are present and ready.

9 THE COURT: Mr. Brunson, can I get you to stand up
10 for just a second?

11 Would you state your name for me, please?

12 THE DEFENDANT: John Christopher Brunson.

13 THE COURT: And, Mr. Brunson, you're the Defendant in
14 this case?

15 THE DEFENDANT: Yes, Your Honor.

16 THE COURT: And you understand we're here today on a
17 motion filed by your attorney to suppress evidence seized in
18 your home pursuant to a search warrant that was executed on
19 September 3, 2009?

20 THE DEFENDANT: Yes, Your Honor.

21 THE COURT: Okay. Thank you very much. You can be
22 seated.

23 Mr. Castillo, there was a search warrant, so you've
24 got the burden, so be glad to -- are you going to call any
25 witnesses? Do you want to -- what would you like to do?

1 MR. CASTILLO: I will call one witness, the agent --

2 THE COURT: Okay.

3 MR. CASTILLO: -- that was in charge.

4 THE COURT: All right.

5 MR. CASTILLO: So I would call Ms. Santana to the
6 stand.

7 THE COURT: Ms. Santana, would you come up, please,
8 ma'am, and let Mrs. LaForge swear you as a witness?

9 (Pause)

10 THE CLERK: If you will raise your right hand.

11 (The witness was sworn)

12 THE CLERK: Have a seat right there.

13 THE WITNESS: Thank you.

14 THE COURT: Mr. Castillo, you may proceed.

15 JUANITA SANTANA, DEFENDANT'S WITNESS, SWORN

16 DIRECT EXAMINATION

17 BY MR. CASTILLO:

18 Q. Good afternoon. Would you state your name, please?

19 A. Juanita Santana.

20 Q. And, Ms. Santana, how are you employed?

21 A. I am a special agent with Immigration and Customs
Enforcement.

22 Q. And were you the agent in charge over the John Brunson
case, the case we're here for today?

23 A. Yes, I am the case agent.

1 Q. Okay. And were you also in charge of the preliminary
2 investigations of this case before Mr. Brunson was arrested?

3 A. Yes, sir.

4 Q. And you also requested that a search warrant be executed
5 for -- was alleged to be Mr. Brunson's residence; is that
6 correct?

7 A. That's correct.

8 Q. Okay. And was that this 5757 Long Avenue?

9 A. That's correct.

10 Q. At the time you requested that search warrant, did you
11 provide the magistrate with an affidavit?

12 A. Yes, I did.

13 Q. Was there any hearing held before the magistrate?

14 A. No, sir.

15 Q. Okay. So the evidence provided was the affidavit?

16 A. Yes, sir, and photographs of the residence.

17 Q. And photographs of the residence.

18 Okay. In your investigation and in the affidavit
19 presented to the magistrate judge, you listed several different
20 names, one being Alan Clarke and the other one Chris Howell?

21 A. That's correct.

22 Q. Who did you identify to be Alan Clarke?

23 A. Alan Clarke is the complainant who initially contacted the
24 Royal Canadian Mounted Police referencing the conversation he
25 had in a chat room with Chris Howell.

1 Q. Did Alan Clarke provide you a transcript of that online
2 communication?

3 A. He provided the Royal Canadian Mounties with copies of the
4 chat log and photographs that were transmitted via the web cam
5 from Howell to him.

6 Q. Do you know if that chat log was complete or was only
7 partial or part of the communication that they had online?

8 A. We received three pages. And when you read the chat log,
9 you can tell the conversation had already started.

10 MR. CASTILLO: Your Honor, may I approach the witness
11 to hand her a copy of that chat log?

12 THE COURT: You may.

13 MR. CASTILLO: Thank you.

14 BY MR. CASTILLO:

15 Q. Let me show you some of the discovery that I received in
16 the case.

17 A. Yes.

18 Q. You can look through those pages and tell me if that's the
19 chat log.

20 A. Yes, this is what I recognize as the chat log.

21 Q. Okay. And I notice that there's -- seems like two
22 different users online.

23 A. That's correct.

24 Q. And do you know who these two users were identified as?

25 A. Well, the first user is Alan Clarke, who was at the time

1 posing as a female. And the second one is Chris Howell, who
2 was subsequently identified as John Christopher Brunson.

3 Q. Okay. So Alan Clarke, you said, was posing as a female?

4 A. That's correct.

5 Q. During part of this conversation, were they on the web
6 cam?

7 A. Yes.

8 Q. You put that in your affidavit?

9 A. Yes.

10 Q. And on that web cam did Mr. Clarke say he could see the
11 person on the other side?

12 A. Yes.

13 Q. Okay. And did he print out some sort of photo shot from
14 that program?

15 A. He printed two photos, yes.

16 Q. Did he say whether Mr. Brunson could see him from his
17 side?

18 A. Yes. During the interview he did with constables, he
19 stated that he was feeding into the web cam video of a female,
20 that he is very computer knowledgeable, and that is what he was
21 doing.

22 Q. Okay. So, apparently, you can feed onto the computer the
23 image of someone else. Does it look like a live image? Do you
24 know?

25 A. It appears so.

- 1 Q. And so what Mr. Brunson could see, according to
2 Mr. Clarke, was a female?
3 A. That's correct.
4 Q. And what Alan Clarke was seeing was allegedly Mr. Brunson?
5 A. That's correct.
6 Q. Okay. And was that in your affidavit?
7 A. Yes.
8 Q. All right. On this chat conversation here, it looks like
9 it starts off with Alan Clarke saying, "How young is Young
10 West?"
11 A. That's correct.
12 Q. Is that correct?
13 A. Yes.
14 Q. So it looks like there is a part of this cut off?
15 A. It appears as if he started recording it, saving it after
16 the fact, after he had already started.
17 Q. Okay. And I noticed in the affidavit provided to the
18 magistrate there seems to be a statement in there that says
19 that he had performed acts previously?
20 A. Yes.
21 Q. Okay. But in this chat conversation there's -- I mean, is
22 there anything in there that says that acts had already been
23 performed?
24 A. May I see it?
25 Q. Sure.

1 | A. Thank you.

2 | (Pause)

3 Q. I guess my question is, the first part of the conversation
4 especially, because that's when the little girl is referenced,
5 doesn't it seem more to be referring to something that may
6 occur in the future as opposed to something that has already
7 occurred?

8 A. It is something that is about to occur. From the
9 interviews with Clarke and from reading the chat log, evidently
10 it's imminent that it's going to happen. And the way that
11 Brunson discusses it, it looks as if it's a regular thing that
12 he does.

13 Q. Okay. But that's -- I mean, you're telling me what you've
14 discussed with Clarke. Have you talked to Clarke personally?
15 Did you get the information from him to put in the affidavit?

16 A. I got a recorded interview from the Mounties that was
17 turned over to our investigators in Vancouver, British
18 Columbia. And I got the notes that they sent me.

19 THE COURT: So the answer is no, you haven't spoken
20 to --

21 | THE WITNESS: To Clarke, no, sir.

THE COURT: -- Clarke?

23 BY MR. CASTILLO:

24 Q. Okay. So just looking at that chat log, though, there is
25 no reference to any prior acts committed on this child; is that

1 correct?

2 A. When Brunson, posing as Howell, said what the child can do
3 with him, one would infer that it has happened in the past.
4 And it's pretty graphic in nature in the chat.

5 Q. Now, and your -- and the evidence that came from the
6 interview with Clarke and that chat log, did any act actually
7 occur during this online communication?

8 A. No, it did not.

9 Q. So during that -- what is it, about a three-minute
10 conversation?

11 A. I don't know the length.

12 Q. Okay. Nothing refers other than that -- in reference to
13 the child other than that about maybe five or six different
14 lines of the parties going back and forth; is that correct?

15 A. Yes.

16 Q. Now, based on this information, is it correct that your
17 investigations eventually led you to the residence of the
18 Howells?

19 A. Yes.

20 Q. And who are the Howells?

21 A. The Howells are Jeffrey Mark Howell and Marie Howell.
22 They were friends of John Christopher Brunson. Marie Howell
23 dated Brunson in the ninth grade, and they are friends.

24 Q. Okay. And how did you get to the Howell residence? What
25 led you there?

1 A. Okay. Very early on in the very early stages of the
2 investigation, we received from intelligence analysts the name
3 Chris Howell and several web pages that Chris Howell is
4 associated with as well as networking sites.

5 He has a profile listed as West Tex Dad, as a
6 31-year-old male living in Odessa. Basically, he has profiles
7 maintained in Yahoo, MySpace, ANYwebcam, and Adult Space.
8 He --

9 Q. Where -- I'm sorry. Let me stop you there. Where
10 eventually did you find that address that led you to the Howell
11 residence?

12 A. Okay. Chris Howell on his MySpace page, he has a patch
13 that it says "Permian Basin Airsoft." By researching Permian
14 Basin Airsoft, we discovered a member by the name of John, John
15 who is Army Scout 31. His profile is identical to Chris
16 Howell's profile. Even the same typographical errors show in
17 both profiles. They're both adult males out of Odessa. John
18 has photographs of Jeffrey and Marie Howell in his profile.

19 We were able to establish who the Howells were, and
20 we paid them a visit. Since we had the pictures from John's
21 MySpace page and Chris Howell's pictures that he fed to Alan
22 Clarke, we took both photographs to the Howells' residence and
23 pretty much asked them --

24 Q. Let me stop you right there. I apologize.

25 A. Yes.

1 Q. You say that they had the same typographical mistakes set
2 up on these sites.

3 On your affidavit didn't you say "similar," not the
4 same?

5 A. Yes. Similar and overlapping in nature, yes.

6 Q. Okay. And so the Howells -- which is the last name of the
7 person who was online was Howell; is that correct?

8 A. That's correct.

9 Q. Okay.

10 A. That's the name he used.

11 Q. And the address you picked up was the residence of Jeffrey
12 Howell and Marie Howell?

13 A. That's correct.

14 Q. Did you seek to obtain a search warrant for that residence
15 before you went to it?

16 A. No.

17 Q. Okay. So you went to that residence and you met with the
18 Howells, and you showed them photo shots of what Mr. Alan
19 Clarke gave you; is that correct?

20 A. Chris Howell fed him through the web cam, yes.

21 Q. Okay. That's what Mr. Clarke said?

22 A. Yes.

23 Q. All right. And then the Howells -- and correct me if I'm
24 wrong, if I'm missstating your affidavit. The Howells
25 identified the person in that shot as a John Brunson?

1 A. That's correct.

2 Q. And they referred you to a different address?

3 A. Yes.

4 Q. Okay. Then that address -- was that address listed under

5 John Brunson?

6 A. No.

7 Q. Okay. Was it listed under the name of Johnsons?

8 A. Yes.

9 Q. And did you do a property records search on that house?

10 A. Yes.

11 Q. Okay. Is that where you found the Johnsons?

12 A. Yes.

13 Q. Did you attempt to find out or make contact who the

14 Johnsons were?

15 A. No.

16 Q. And when you prepared your affidavit, who prepared it?

17 A. I did.

18 Q. Okay. Was it just based on your information, your

19 investigations?

20 A. It's based on my information and the information

21 transferred to me by Jesse Miller, the agent in Vancouver,

22 British Columbia; information also obtained by the computer

23 forensic agent Heath Hardwick; and cooperative efforts through

24 surveillance on establishing the residence by other agents in

25 my office.

1 Q. There was also a subpoena sent to Yahoo.com; is that
2 correct?

3 A. Jesse Miller did that, yes.

4 Q. What was obtained from Yahoo.com?

5 A. Basically, that the user is Chris Howell out of Odessa, 33
6 years old, and that his user ID is West Tex Dad.

7 Q. Was there an address?

8 A. No.

9 Q. Was there an IP address?

10 A. There were several, yes.

11 Q. Several IP addresses?

12 A. (Indicating in the affirmative)

13 Q. Did you check -- I noticed in your affidavit you give an
14 explanation of IP addresses and how they are unique and they
15 can point you to a residence.

16 Were you able to determine that based on this IP
17 address? I know I asked you the same question at the detention
18 hearing, and I think you told me no; is that correct?

19 A. That's correct. We removed three computers out of the
20 Brunson residence.

21 Q. Well, I'm talking about the IP address that you received
22 from Yahoo.com. Were you able to link --

23 A. That was received after the search warrant. It is not
24 used in the affidavit. That information is not used in the
25 affidavit.

1 Q. Okay. After you prepared your affidavit, where did you --
2 what did you do from there? Where did you take it to get the
3 warrant?

4 A. I came to the District Court to see the Judge to obtain
5 the warrant, yes.

6 Q. Did you ever see any of the AUSA's?

7 A. Yes. I saw John Klassen the night before.

8 Q. John Klassen?

9 A. Yes.

10 Q. Did he look at the affidavit?

11 A. Yes.

12 Q. You e-mailed it to him, faxed it to him?

13 A. I actually met him at a baseball game.

14 Q. Met him at a baseball game?

15 A. (Indicating in the affirmative)

16 Q. You also stated in your affidavit that storage devices,
17 modems, all sorts of computer devices can store -- they are
18 unique. They can store thousands and thousands of pages of
19 information; is that correct?

20 A. That's correct.

21 Q. And in there you put an Attachment B. Do you remember
22 that Attachment B?

23 A. Yes. May I look at it?

24 Q. Sure.

25 A. Thank you.

1 | (Pause)

2 Q. Okay. You prepared this?

3 A. Yes, I did.

4 Q. All right. The first paragraph seems to refer to the
5 statutory section for production of child pornography; is that
6 correct?

7 A. We were initially pursuing an attempt at producing the
8 child pornography.

9 Q. Okay. Then you get into the second and third paragraphs
10 which I just -- I guess are -- it seems like quite a few things
11 that are related to computers?

12 A. Yes.

13 Q. All right. These type of devices, are these -- the ones
14 listed in here, are these the kind that can store thousands and
15 thousands of pages of information and all sorts of data about a
16 person?

17 A. Yes, sir.

18 Q. I noticed in here that you didn't put any limits as to
19 maybe just images or photographs. Was that purposeful?

20 A. Basically, the format that we use when we are pursuing
21 computer related crimes.

22 Q. So this language in here is just generated somewhere and
23 spit onto the page through a computer?

24 A. Yes. Uh-huh.

25 Q. Did you modify this in any way, or was this all just kind

1 of standard language from a program?

2 A. I might have just added the respective section of the law.

3 MR. CASTILLO: I pass the witness.

4 THE COURT: Ms. Fleck.

5 CROSS-EXAMINATION

6 BY MS. FLECK:

7 Q. Okay. Good afternoon, Agent Santana.

8 A. Good afternoon.

9 Q. Let's talk about Attachment B real quick. You mentioned
10 this is language that you use in a lot of search warrants
11 dealing with computers with cyber crimes; is that correct?

12 A. Yes, ma'am.

13 Q. And you reviewed this language to be sure it applied
14 specifically to this case, didn't you?

15 A. That's correct.

16 Q. And you also brought Attachment B along with the rest of
17 the warrant application and affidavit to John Klassen with the
18 U.S. Attorney's Office to review and make sure it was
19 appropriate in this case as well, correct?

20 A. Yes, ma'am.

21 Q. And given the information that you knew, that Mr. Brunson
22 was speaking over a web chat using the Internet, that
23 information that was contained in Attachment B was appropriate
24 in your belief and with Mr. Klassen as far as you were
25 concerned, correct?

1 A. Yes.

2 Q. Now, let's talk about your affidavit. And I know it
3 speaks for itself, so I will just go through it quickly. But
4 you initially received a complaint from ICE up in Canada who,
5 in turn, had received a complaint from a citizen through the
6 Royal Canadian Mounted Patrol; is that correct?

7 A. That's correct.

8 Q. And you were given, unlike some cases, a photograph of the
9 person you were looking for rather than just following an IP
10 address, right?

11 A. Yes, ma'am.

12 Q. And you received part of a printout of the chat or the
13 conversation that the Defendant was having with this Canadian
14 citizen, correct?

15 A. Yes, ma'am.

16 Q. And part of that included the Defendant stating -- and I
17 quote -- "Looking to get naughty with his three-year-old
18 daughter," correct?

19 A. Yes, ma'am.

20 Q. And you included that in your affidavit, right?

21 A. Yes.

22 Q. You also included Mr. Clarke, the Canadian citizen's
23 response, which was -- and I quote -- "What can a
24 three-year-old do with Daddy?"

25 A. Yes, ma'am.

1 Q. And that was also included in your affidavit, correct?

2 A. Yes.

3 Q. And then the Defendant, who at this point was identifying
4 himself as Chris Howell, right?

5 A. Yes.

6 Q. Replied, "She can play" -- and I quote -- "with Daddy's
7 big dick, and I can get her to suck me," correct?

8 A. Yes, ma'am.

9 Q. And Mr. Clarke relayed to law enforcement, which was then
10 relayed to you, that it was clear to him that Mr. Howell, as he
11 knew him at the time, was ready to engage in oral sex with the
12 child?

13 A. Yes.

14 Q. And that he was sure it was going to happen soon, correct?

15 A. Yes, ma'am.

16 Q. And that the child -- he actually saw a child that
17 appeared to be a three-year-old female child running around in
18 the background while this web cam is going on, correct?

19 A. That's correct.

20 Q. And you described all of that in your affidavit?

21 A. Yes, ma'am.

22 Q. And the child appeared to Mr. Clarke, as you put in your
23 affidavit, to be compliant and relaxed with her dad around this
24 web cam, correct?

25 A. Yes, ma'am.

1 Q. And Mr. Clarke relayed to law enforcement that he was
2 extremely concerned for the safety of the child, correct?

3 A. Yes, ma' am.

4 Q. And you were concerned with that child's safety, too,
5 weren't you?

6 A. Yes.

7 Q. In fact, what day did you receive this complaint from
8 Canada?

9 A. I received the complaint on August 31st around 5:30 in the
10 afternoon.

11 Q. And when were you able to put together this affidavit and
12 bring it to Mr. Klassen?

13 A. We conducted the primary investigation rather quickly
14 because we wanted to rescue the child. So I took the affidavit
15 on September 2nd to be reviewed, and on September 3rd we
16 obtained the search warrant and executed it.

17 Q. And from August 31st to September 2nd, again, you had a
18 still photograph from the web cam of the perpetrator,
19 Christopher Howell, who you later learned to be John Brunson;
20 is that correct?

21 A. Yes, ma' am.

22 Q. And with that photograph, you were able to see who it is
23 you were looking for, right?

24 A. That's correct.

25 Q. And you actually tracked down Marie and Jeffrey Howell,

1 correct?

2 A. Yes.

3 Q. Were you able to verify by looking at Jeffrey Howell that
4 he wasn't the person that you had in the picture?

5 A. Correct.

6 Q. And Mr. Jeffrey Howell had two three-year-old children,
7 twins, at his house, right?

8 A. That's correct.

9 Q. Were you also able to verify by looking at those children,
10 the twins, that they weren't the three-year-old from the web
11 cam?

12 A. Correct.

13 Q. You also had a picture, I guess, of the three-year-old
14 from the web cam?

15 A. Yes.

16 Q. Is that right?

17 A. Yes.

18 Q. You also, prior to executing the search warrant or even
19 finalizing the affidavit, conducted surveillance of the
20 residence that the Howells told you Mr. Brunson lived in,
21 correct?

22 A. That's correct.

23 Q. And during the surveillance, you saw the Defendant John
24 Brunson leaving his residence and getting into his vehicle,
25 correct?

1 A. That's correct.

2 Q. And you included all of that information in your affidavit
3 as well?

4 A. That's correct.

5 Q. You were asked questions about subpoenas to Yahoo and IP
6 addresses. Isn't it true that sometimes in this type of
7 investigation you utilize those tools as far as subpoenaing IP
8 addresses to locate a physical address where a computer user is
9 located; is that right?

10 A. That's correct.

11 Q. In this case, isn't it true that you didn't wait for those
12 subpoenas to be returned because you were in fear for the
13 safety of a three-year-old child?

14 A. Yes, ma'am.

15 Q. Did you believe that you were acting in good faith on a
16 valid search warrant in this case?

17 A. Yes, ma'am.

18 Q. And did you believe that you were acting in good faith to
19 save this three-year-old child?

20 A. Yes, ma'am.

21 Q. Did you at any time lie or mislead Judge Counts when you
22 showed him this search warrant application and affidavit?

23 A. No, ma'am.

24 Q. Did you believe that you had probable cause for the search
25 warrant?

1 A. Yes, ma'am.

2 Q. And by signing a search warrant, did you believe that
3 Judge Counts agreed with you?

4 A. Yes, ma'am.

5 Q. Isn't it true that Judge Counts had to go back
6 and make some clarifications and changes to your affidavit
7 before he would sign it?

8 A. That's correct.

9 MS. FLECK: I have no further questions.

10 THE COURT: Okay. Mr. Castillo.

11 REDI RECT EXAMINATION

12 BY MR. CASTILLO:

13 Q. Agent Santana, the items on the list -- the items on the
14 inventory that were seized from the residence, do you remember
15 that list?

16 A. Yes.

17 Q. Or do you have it with you?

18 A. No, I do not.

19 Q. Okay. I'll just quickly read them off, and tell me if you
20 remember these. A Dell laptop, a Dell CPU, a modem, a router,
21 a CPU, Konica Minolta digital camera, a web cam, a 35
22 millimeter Polaroid camera with film, one Philips digital
23 camera, one black wallet with military ID badge, 14 adult
24 industry magazines, and one floppy drive and one card reader.

25 A. That's correct.

- 1 Q. Those were the items seized from the residence?
- 2 A. Yes, sir.
- 3 Q. Most of these seem to be computer related items. There
4 are also some cameras taken and adult magazines?
- 5 A. Yes, sir.
- 6 Q. Were those items taken just based on your observations and
7 your determination at the scene --
- 8 A. Yes.
- 9 Q. -- that you should take those?
- 10 A. Yes.
- 11 Q. All right. But they weren't listed specifically in the
12 affidavit nor the Attachment B; is that correct?
- 13 A. The cameras were not nor the adult magazines.
- 14 Q. All right. Now, back to Mr. Clarke --
- 15 A. Yes.
- 16 Q. -- the person who gave a lot of the information that began
17 the search.
- 18 Did you ever do a background check on him to check
19 his reliability on the information he was giving you?
- 20 A. No, I did not.
- 21 Q. Not even considering he was posing as a female, according
22 to him?
- 23 A. No.
- 24 Q. And as far as their conversation, there were never any
25 images transmitted over the Internet, correct?

1 A. The images transmitted through the web cam were the photos
2 of the child in her underwear running around in the background
3 and of Mr. Brunson.

4 Q. Okay. I mean by e-mail or, you know, through just an
5 actual photograph. Was a photograph or something like that
6 ever transmitted?

7 A. Not to my knowledge.

8 Q. Okay. So the only thing you're talking about is what
9 Mr. Clarke could see through the web cam and what the person
10 named as Howell, who led you to Mr. Brunson, could see through
11 his web cam?

12 A. That's correct.

13 Q. And you said you didn't wait on the subpoena from Yahoo.
14 When was that applied for?

15 A. Jesse Miller applied for the subpoena very early on, the
16 very first couple of days within the week. I don't even
17 remember the specific date, but he applied for it.

18 Q. Before the warrant was obtained?

19 A. Yes.

20 Q. Do you know when the information came back from Yahoo?

21 A. After the warrant had been served.

22 Q. Like a day after?

23 A. Probably a couple of days, yes.

24 MR. CASTILLO: No more questions.

25 THE COURT: Ms. Flack?

1 MS. FLECK: Just briefly.

2 RECROSS-EXAMINATION

3 BY MS. FLECK:

4 Q. Agent Santana, you were asked about items that were seized
5 during the search warrant.

6 Didn't forensic -- Special Agent Heath Hardwick, who
7 is trained in computer forensic, do a preview -- what we call a
8 preview of the computer at Mr. Brunson's residence?

9 A. No preview was done.

10 Q. He did not? Okay.

11 Let's talk about the corroboration you had of
12 Mr. Clarke. You didn't know Mr. Clarke, correct?

13 A. No, ma'am.

14 Q. But didn't you corroborate what he was saying or other law
15 enforcement officers did by taking the photograph of the
16 defendant, the photograph of the child, as well as a copy of
17 the chat log which showed what they were talking about?

18 A. Yes, ma'am.

19 (Government's Exhibit No. 1 marked)

20 MS. FLECK: And, Your Honor, at this time I would
21 like to offer into evidence what I premarked as Government's
22 Exhibit 1, which is the search warrant, the application, as
23 well as the affidavit and attachments that were all presented
24 to Judge Counts in this case.

25 THE COURT: Any objection?

1 MR. CASTILLO: May I see them?

2 THE COURT: You may.

3 (Pause)

4 MR. CASTILLO: No objections.

5 MS. FLECK: May I approach?

6 THE COURT: Yeah.

7 Government's Exhibit 1 is admitted.

8 (Government's Exhibit No. 1 received)

9 MS. FLECK: I have nothing else, Your Honor.

10 THE COURT: Okay. Anything else, Mr. Castillo, of
11 this witness?

12 REDI RECT EXAMINATION

13 BY MR. CASTILLO:

14 Q. The search warrant -- I may have asked you this. But it
15 makes reference to Attachment B. It doesn't make any reference
16 to Attachment A.

17 Is Attachment A considered your affidavit, or do you
18 know?

19 A. Actually, Attachment A is the description of the premises
20 to be searched.

21 Q. Okay. Thank you.

22 MR. CASTILLO: No more questions, Your Honor.

23 THE COURT: Ms. Fleck?

24 MS. FLECK: Nothing else.

25 THE COURT: You can step down. Thank you, Agent.

1 THE WITNESS: Thank you, sir.

2 (Witness excused)

3 THE COURT: Mr. Castillo, any other witnesses?

4 MR. CASTILLO: I have no other witnesses, Your Honor.

5 I have a small closing argument.

6 THE COURT: Ms. Fleck, any evidence that the
7 Government would like to put on?

8 MS. FLECK: No, Your Honor.

9 THE COURT: Mr. Castillo, be glad to hear from you on
10 argument.

11 MR. CASTILLO: Your Honor, we did bring a motion to
12 suppress here and claiming a violation of the Defendant's
13 Fourth Amendment constitutional rights, specifically on two
14 issues. One, that the evidence and specifically the affidavit
15 presented to the magistrate contained insufficient probable
16 cause to authorize issuing this warrant. I believe the Courts
17 have looked to the totality of the circumstances and
18 specifically to the information in the affidavit to make this
19 determination.

20 If you look at the circumstances here, there was
21 information about a chat log conversation. There were never
22 any images transmitted here. The main point was that
23 Mr. Clarke was chatting with allegedly Mr. Brunson, and they
24 were talking about acts to be done. There is testimony that
25 nothing was done and that it was acts that possibly were going

1 to occur in the future.

2 Also, the investigating officers based most of the
3 information that led them to the residence on the information
4 received from Mr. Clarke, which, again, in evidence stated that
5 he was posing as a female rather than himself. And his
6 reliability was never really checked through a criminal
7 background check or through any other information. There was
8 an interview done. Based on some of that interview, there was
9 more notes put in the affidavit. However, we question his
10 reliability.

11 When an address was obtained, it was the address of
12 the Howells, not the Defendant's. No warrant was obtained
13 there. They visited the residence and then took the word of
14 the Howells on what residence the Defendant resided in and
15 obtained a search warrant for that. The property records
16 showed that the house belonged to the Johnsons.

17 As the agent testified, no communication was ever
18 sought of the Johnsons to see if John Brunson was residing
19 there, if he was related to them, if they were loaning him the
20 house. And so we would question that part as not -- as another
21 reason for showing that insufficient probable cause existed.

22 In addition, the second point we bring, Your Honor,
23 is the particularity requirement in this warrant. This
24 affidavit has two parts really to it. The first part being the
25 general statutory language at the top stating that they are

1 seeking evidence of Section -- 18 U.S.C., Section 2251. And
2 the second part being the two center paragraphs which to us
3 seem like just a general description of almost every computer
4 related technology there is out there.

5 As stated in the cases I cited in my motion, Your
6 Honor, and by the agent, you can store thousands and thousands
7 of pages of information in those kind of devices which contain
8 anything from child pornography to tax returns to eBay
9 transactions to any other related information.

10 Our concern is that this affidavit wasn't limited in
11 some way, for instance, as to images, pictures related to child
12 pornography or some specific language like that. It just
13 stated all computer related technology.

14 And then based on the suppression, the items seized
15 consisted not only of computer devices but cameras. You also
16 have adult magazines. And, again, I'm not sure if those were
17 specifically mentioned. We allege that those weren't
18 specifically mentioned in the affidavit.

19 And so we challenge the warrant based on the
20 particularity requirement, and we would say that on its face it
21 is deficient and objectively -- using an objective standard, we
22 say that the good-faith exception does not apply to counter the
23 State's [sic] point in their motion.

24 The Courts have stated that if an affidavit is so
25 facially deficient that an objectively reasonable officer would

1 know that it is illegal -- that the execution of it is
2 unconstitutional, we believe, again, based on the overbreadth
3 of this affidavit that the officers should have realized that
4 it was unconstitutional and should be modified to include more
5 specific provisions as to the evidence that they were seeking
6 from the residence.

7 Thank you.

8 THE COURT: Ms. Fleck.

9 MS. FLECK: Your Honor, first with regards to the
10 good-faith exception, I think the case law is clear that Your
11 Honor should look at the search warrant in this type of motion
12 to suppress and follow a two-part test, the first part being
13 whether or not the good-faith exception applies. And if Your
14 Honor finds that does apply, we need not even look at whether
15 or not the search warrant had -- or the magistrate had a
16 substantial basis for finding probable cause on the search
17 warrant.

18 There is no evidence presented by the defense, which
19 is their burden here today, to show that any of these agents
20 lied or misled Judge Counts in any way or that Magistrate Judge
21 Counts wholly abandoned his judicial role. Therefore, they
22 cannot show that the agents did not act in good faith. Quite
23 to the contrary, Agent Santana's testimony here today shows
24 these agents did everything that they were supposed to do.

25 They did act in good faith. They acted immediately.

1 They did as much as they could and as fast as they could to
2 save that child. But in the end it did take four days, because
3 that's how long it took to play by the rules and to get the
4 search warrant approved appropriately rather than go
5 immediately to the house and try to rescue that child.

6 They had a lengthy affidavit prepared. It was
7 reviewed by the supervisor of the U.S. Attorney's Office and
8 approved by him. It was then taken by the magistrate. He read
9 it. He reviewed it. Agent Santana testified that several
10 changes or clarifications were made before he signed off on it.
11 They then attached -- they also had a lengthy affidavit and
12 attachments to that affidavit, all correctly incorporated into
13 the search warrant itself. The search warrant was executed,
14 and all of that was done in good faith.

15 Therefore, I would argue that because the agents
16 acted in good faith, Your Honor doesn't have to go any further
17 into the inquiry. However, for purposes of this motion, I
18 would also point out that there was sufficient probable cause
19 in that Judge Counts did have a substantial basis for finding
20 probable cause in this affidavit.

21 If you look at the affidavit itself, it goes through
22 what law enforcement in Canada learned from Alan Clarke. And
23 no, they didn't know this person. He wasn't a law enforcement
24 officer or someone known to law enforcement, but they were able
25 to corroborate what he was saying. They had a still photograph

1 of the suspect. They had a still photograph of the victim.
2 They had copies of the chat logs, which were sexual in nature,
3 talking about oral sex with a three-year-old, which was
4 corroborated by the photographs that they were seeing.

5 They went and corroborated the Howells. They talked
6 to the Howells. They looked at the photograph. They saw that
7 it wasn't Jeffrey Howell. They asked Mr. and Mrs. Howell who
8 the person was in the photograph. The Howells told them, "Oh,
9 that's our friend, John Brunson." They gave them an address
10 and directions to this address. And all of this is set forth
11 in the affidavit.

12 If you look at paragraph -- the top of page 5 of the
13 affidavit, Agent Santana explains that Agents Rodriguez and
14 Pena went directly to the location of the residence based upon
15 the Howells' directions and confirmed their description of the
16 residence as being the location. It even describes the
17 discrepancy with the addresses, and that was clarified several
18 times throughout the affidavit.

19 They corroborate the two vehicles that should be at
20 the residence. They also set up surveillance, as Agent Santana
21 told you here today, and were able to corroborate that the
22 Defendant was the person matching the photograph who was
23 leaving the residence, getting into one of the vehicles.

24 They talked to the Howells and found out -- and,
25 again, this is explained in the first full paragraph on page

1 5 -- that the Brunsons' in-laws, the Johnsons, actually own the
2 property. All of that is described in the affidavit.

3 And they didn't just take the Howells' word for it.
4 They did property checks. They found out that that wasn't --
5 the property was owned by the Johnsons. But that's irrelevant,
6 because the person they knew to be the suspect was the person
7 in that photograph, and that's the same person that the Howells
8 identified and that the agents themselves saw coming out of
9 that residence.

10 Looking at the four corners of the search warrant and
11 affidavit in support of the search warrant, Your Honor, I think
12 it's clear that there was sufficient probable cause and that
13 Judge Counts was not unreasonable in signing the search
14 warrant. And before you even get to that, again, I would urge
15 that these agents acted in good faith.

16 Thank you.

17 THE COURT: Mr. Castillo, anything in rebuttal?

18 MR. CASTILLO: No, Your Honor.

19 THE COURT: The Court finds that the agents did
20 execute the warrant in good faith.

21 The Court further finds that the warrant contained
22 more than bare bones allegations and, in fact, was supported by
23 probable cause.

24 The Court further finds the warrant was sufficiently
25 particular in its description of the items to be seized.

1 And the Court finds that the cases cited by the
2 Defendant from the Tenth Circuit are in point -- or can be
3 distinguished on the facts, particularly when you look at the
4 case of -- the Riccardi case, R-I-C-C-A-R-D-I.

5 In that case, the warrant authorized the search and
6 seizure of the Defendant's entire computer without reference
7 to, quote, any particular federal crime. Because the warrant
8 in this case cites child pornography statutes, Riccardi does
9 not apply. Furthermore, even if Riccardi did apply, it would
10 not mandate suppression, because, as already explained, the
11 warrant in Riccardi was upheld under the good-faith exception.

12 Further, in U.S. -- excuse me. Otero was another
13 case cited by the Defendant. Again, while -- in that case the
14 Court found that the respective warrants were insufficiently
15 particular, they both -- the Court went on to uphold the
16 warrant under the good-faith exception.

17 And in Leary, another case cited by the Defendant
18 from the Tenth Circuit, Leary was not a case involving child
19 pornography. And in that case, Leary was referencing federal
20 statutes that encompass a wide range of criminal conduct. For
21 instance, conspiracy prohibiting illegal export of materials
22 abroad. The Defendant has ignored the fact that Leary also
23 noted that, quote, some federal statutes may be narrow enough
24 to meet the Fourth Amendment particularity requirement.

25 In this case, the Court finds that the laws

1 prohibiting the trade of child pornography are such statutes
2 because there is only one type of evidence that can be subject
3 to seizure in relation to a child pornography warrant, and that
4 deals with images and how they are stored or made of children
5 engaging in sexually explicit conduct.

6 For these reasons, the Court respectfully overrules
7 the Defendant's motion to suppress. The Court will provide a
8 written memorandum opinion and order in this matter.

9 All right. I note, Mr. Castillo, that the Defendant
10 is set to plea on the 22nd. Is that a conditional plea? Is
11 that my understanding?

12 MR. CASTILLO: For right now, yes, Your Honor.

13 THE COURT: Okay. I didn't know if you and
14 Ms. Fleck -- I just noticed on the docket call, when there was
15 a docket call, that there was going to be a plea. And I
16 assumed that it would be a conditional --

17 MS. FLECK: I believe he set a date, but it hasn't
18 been firmmed up between him and the client if that's, in fact,
19 how he wanted to proceed.

20 THE COURT: Because we had the plea deadline time
21 coming up, I think the 22nd may be the plea deadline time.
22 So --

23 MR. CASTILLO: It's actually the 21st, but Judge
24 Counts was in a civil trial, and so we were moving it to the
25 22nd. But it is my understanding that has been pled out or

1 settled, and so we're going to move it back to the 21st.

2 THE COURT: Okay. Well, I would just say if not, we
3 need to get you a date in February so we can try the case.

4 I'm sure you explained to Mr. Brunson about what a
5 conditional plea is and that you reserve the right to appeal my
6 decision on the search and seizure issue, waive other rights of
7 the appeal with the exception of constitutional ineffectiveness
8 assistance of counsel and prosecutorial misconduct, which is
9 the normal sort of plea agreement from the Government.

10 All right. With that, if you will just keep Judge
11 Counts and me informed about what's going on.

12 And Mr. Brunson is remanded back to the custody of
13 the United States Marshals.

14 (Hearing adjourned)

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1 I, TODD ANDERSON, United States Court Reporter for the
2 United States District Court in and for the Western District of
3 Texas, Midland/Odessa Division, hereby certify that the above
4 and foregoing contains a true and correct transcription of the
5 proceedings in the above entitled and numbered cause.

6 WITNESS MY HAND on this 28th day of June, 2010.
7
8
9

10 /s/Todd Anderson
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